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No. _____

In The
Supreme Court of the United States

LUFKIN INDUSTRIES, INC.,
Petitioner,

v.

SYLVESTER MCCLAIN, ON HIS OWN BEHALF AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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July, 2008

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QUESTIONS PRESENTED FOR REVIEW

I. Whether § 703(h) of Title VII of the Civil Rights Act of 1964 permits disparate effect in promotions undisputedly awarded by seniority and without intent to discriminate to be used in establishing unlawful disparate impact under the not-capable-of-separation-for-analysis method added to Title VII by the Civil Rights Act of 1991.

II. Whether the Fifth Circuit's decision imposing a liability period for a Title VII class claim beginning almost three years before the charge that the Court of Appeals found exhausted the administrative remedies for the class was filed conflicts with this Court's decisions negating liability for acts outside the Title VII limitations period.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below.

Petitioner: LUFKIN INDUSTRIES, INC.

Respondents: SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons; BUFORD THOMAS, on his own behalf and on behalf of a class of similarly situated persons; PATRICK ROSS, on his own behalf and on behalf of a class of similarly situated persons; MARY THOMAS, on her own behalf and on behalf of a class of similarly situated persons; EDDIE K. MASK, on his own behalf and on behalf of a class of similarly situated persons; LEROY GARNER, on his own behalf and on behalf of a class of similarly situated persons; SHERRY CALLOWAY SWINT, on her own behalf and on behalf of a class of similarly situated persons; WALTER BUTLER, on his own behalf and on behalf of a class of similarly situated persons; also known as A; FLORINE THOMPSON, on her own behalf and on behalf of a class of similarly situated persons; CLARENCE OWENS, on his own behalf and on behalf of a class of similarly situated persons; also known as C; CLIFFORD R. DUIRDEN, on his own behalf and on behalf of a class of similarly situated persons; EARL POTTS, on his own behalf and on behalf of a class of similarly situated persons; ROALD MARK, on his own behalf and on behalf of a class of similarly situated persons.

RULE 29.6 STATEMENT

Lufkin Industries, Inc. has no parent company and no publicly held corporation owns 10% or more of Lufkin Industries stock.

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Lufkin Industries, Inc. ("Lufkin") respectfully prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 519 F.3d 264 (5th Cir. 2008), and is reproduced in the Appendix ("Pet. App.") at 1a. Plaintiffs and Lufkin timely petitioned for a rehearing. The Court of Appeals Order denying plaintiffs' and Lufkin's petitions is reproduced at Pet. App. 83a. The district court's Amended Final Judgment is reproduced at Pet. App. 37a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). The Court of Appeals panel issued its Revised Opinion on March 10, 2008. Plaintiffs and Lufkin each timely petitioned for rehearing. The panel denied rehearing on April 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (hereinafter § 703(h)):

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or

> different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Section 105(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(B)(i):

> With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

STATEMENT OF THE CASE

Plaintiffs are former and current black employees working at Lufkin's production operations and corporate office in Angelina County, Texas. Originally asserting an across-the-board class action, plaintiffs alleged class-wide unlawful race discrimination under both disparate treatment and disparate impact theories of liability.

The district court (Cobb, J.) dismissed plaintiffs' disparate treatment claims, but certified plaintiffs' disparate impact claims for the following class:

> All Black persons employed for any period of time by defendant Lufkin Industries on or after March 6, 1994, to date, whose compensation, remuneration, benefits, job assignments, promotional opportunities, career advancement and other terms and conditions of employment have been, may have been, or may become, adversely affected by defendant Lufkin Industries' past or present systems of administering hiring, wages, salaries, job assignments, training, evaluations, promotions, demotions, terminations, layoffs, recalls, and rehires.

McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 277-78 (E.D. Tex. 1999).

During the class period certified by the district court, Lufkin maintained four production divisions in Angelina County: Foundry, which produced metal castings; Trailer, which produced trailer truck bodies; Oilfield, which manufactured and repaired oil pumping units; and Power Transmission, which machined high tolerance heavy industrial gearing. Hourly employees in Lufkin's production divisions have been represented for more than fifty years by the AFL-CIO which delegates its collective bargaining responsibilities for Foundry to the Glass, Molder, Pottery, Plastics and Allied Workers Union, Local No. 429 ("GMP"); for the Oilfield machine shop and Power Transmission to the International Association

of Machinists and Aerospace Workers, Local No. 1999 ("IAM"); and for the Oilfield fabrication shop and Trailer to the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 587 ("Boilermakers"). Lufkin and the unions have a single collective bargaining agreement for hourly employees in Angelina County.

The collective bargaining agreement recognizes plant and departmental seniority, with department seniority defined as the length of continuous service in the following departments computed from the date on which an employee went to work in said department: foundry department, pattern shop department, trailer division, fabrication department, machine shop department, and gear repair department. During the class period, the collective bargaining agreement provided:

> Departmental seniority within the bargaining unit shall govern in promotions or demotions within a department, and in reduction of forces within the several departments; and, when forces are increased, employees who have been laid off in a particular department, shall be recalled in the inverse order of their layoffs; provided, said employees shall have departmental seniority status in accordance with the provision of this Article 22; and provided, also, that in the case of promotions, demotions, transfers, layoffs and recalling to work of employees laid off, all as above set out, their departmental seniority shall govern if their ability to perform the work is

> approximately equal. "Ability" as the term is used in the phrase "ability to perform" shall be understood to include the employee's capacity to perform the work, to which they are assigned, with efficiency equal to that of other employees under consideration, and with the same, or equivalent, tools or equipment, which at the time, are customarily available to such employees for their performance of such work. The determination of an employee's ability to perform the work is a function of management; however, in the event an employee is dissatisfied with the company's determination of their ability to perform the work, such dissatisfaction may be made the subject of a grievance. Any employee transferred from one department to another department shall have their seniority frozen in their former department; and shall begin accumulating seniority in the department to which they are transferred.

Most hourly jobs are posted and as the Fifth Circuit noted, "[u]nder the [collective bargaining agreement], the company must post bid sheets for each new hourly opening. Seniority is the main criterion for promotion." Pet. App. at 14a. Lufkin's promotion process for posted hourly jobs is generally summarized:

- Any employee may apply for the job (that is, sign the bid sheet);

- To be eligible, the employee must be seeking a promotion (that is, a higher rated job) and not

be disqualified because of plant rule violations or, in the foundry department, because they are in the attendance control program;

- For most hourly promotions, the process ends here with the senior bidder seeking a promotion being promoted; or, if the senior bidder declines, the next senior eligible bidder is promoted; and

- For some jobs, the employee must also establish job-related ability (that is, pass a paper and pencil test or skill demonstration) and the senior bidder passing the test or skill demonstration is promoted.

The district court found that in hourly jobs, "[s]eniority is the main criterion, but ability is also a necessary qualification." Pet. App. at 43a. The district court further determined:

> Although seniority is the paramount qualification listed in the CBA, Lufkin has established several other rules which affect promotions. For some positions, Lufkin requires an "objective" test that generally involves a demonstration of basic math, literacy, and competence with the relevant machinery. Some of the criteria are objectively verifiable, such as math skills or reading ability. Other criteria are left to the satisfaction of individual managers.
>
> To ensure that competent workers occupy all positions, the company has also inserted an "ability" clause in the CBA that allows Lufkin to

> fill positions on the basis of ability and regardless of seniority. The ability clause appears to trump all other considerations.

Id. at 43a-44a.

Two claims went to trial: discrimination against blacks in assignment of newly hired employees; and racially discriminatory promotion practices that rested on largely subjective decision-making criteria carried out by a largely white supervisory core. Pet. App. at 4a. Plaintiffs' disparate impact promotion analysis, which concluded there was a statistically significant shortfall in black promotions, included numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate. *Id.* at 19a. The district court entered judgment for plaintiffs on each claim.

Plaintiffs conceded that Lufkin's use of departmental seniority was a bona fide seniority system. Neither the district court nor the Fifth Circuit made any finding that Lufkin's seniority system was not bona fide or that Lufkin's seniority system resulted from an intention to discriminate because of race.

On appeal, the Fifth Circuit reversed and vacated the district court's judgment as to the initial assignment claim but affirmed the judgment on the promotion claim. *Id.* at 33a. Addressing whether plaintiffs had exhausted administrative remedies, the Fifth Circuit found, contrary to the district court's finding, that the letter filed by Sylvester McClain in January 1995 (which the district court accepted as the

equivalent of a charge) would not support either of the class claims. It did, however, find that a later-filed charge, filed on February 24, 1997 by Buford Thomas, would support the class promotion claims. Nevertheless, the Fifth Circuit accepted promotions made outside the limitations period set by the Thomas charge to support the liability findings and directed the district court on remand to compute back pay on the shortfall of promotions beginning from March 6, 1994, the date of limitations established by the earlier McClain charge. *Compare id.* at 21a with 26a.

Affirming plaintiffs' promotion claim, the Fifth Circuit determined that the district court's finding of subjective decision making in Lufkin's promotion system was not clearly erroneous, *id.* at 17a, and that Lufkin's promotion process was not capable of separation for analysis under 42 U.S.C. § 2000e-2(k)(1)(B)(i). *Id.* at 19a.

Critical to the first question presented for review was the Fifth Circuit's opinion on this latter issue –

> Lufkin argues, for example, that the plaintiffs' expert could have separated the challenged employment practices from its legitimate seniority system. The expert included in his analysis numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate. This argument ignores the district court's finding that Lufkin affords management considerable discretion in deciding whether to follow seniority in promotions. Plaintiffs could not

> statistically analyze the actual practice they challenge—subjective and discretionary application of the seniority provisions—by excluding promotion based on seniority. Seniority, the court found, was likely to have been irrelevant to the promotion.

Id.

Neither the district court nor the Fifth Circuit explicitly addressed § 703(h), which Lufkin argued insulated seniority-based promotions from the disparate impact claim. *See, e.g.*, Defendant's Pre-Trial Proposed Findings of Fact and Conclusions of Law (Docket No. 268) at ¶¶ 206-211; Lufkin Industries' Brief of Appellee/Cross-Appellant at 35-36.

REASONS FOR GRANTING THE PETITION

I. SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT PERMIT DISPARATE EFFECT IN PROMOTIONS UNDISPUTEDLY AWARDED BY SENIORITY AND WITHOUT INTENT TO DISCRIMINATE TO BE USED IN ESTABLISHING UNLAWFUL DISPARATE IMPACT UNDER THE NOT-CAPABLE-OF-SEPARATION-FOR-ANALYSIS METHOD ADDED TO TITLE VII BY THE CIVIL RIGHTS ACT OF 1991.

The tension created when the use of seniority has a disparate effect in the workplace is of such critical importance that this Court addressed the proper application of § 703(h) eight times before passage of the Civil Rights Act of 1991 – *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Supreme Court review is again required because the Fifth Circuit's decision ignores the special treatment Congress provided bona fide seniority systems by requiring the disparate effect of undisputed seniority-based promotions be counted in the "not capable of separation for analysis" method of disparate impact proof created by the Civil Rights Act of 1991. As this Court has often decided, without intent to discriminate, seniority-based promotions cannot give rise to unlawful disparate impact notwithstanding that such promotions have a disparate effect. The Fifth Circuit's use of the Civil Rights Act of 1991 to repudiate this principle reverses the balance Congress carefully struck in favor of seniority systems, undermines this Court's opinions protecting that congressional intent, and threatens to disrupt collective bargaining on seniority which is a foundation of our national labor policy.

A. By Permitting Lawful, Seniority-Based Promotions to Create Unlawful Disparate Impact, the Fifth Circuit Interferes With the Collective Bargaining Process and Threatens the Recognition of Seniority in Awarding Competitive Benefits.

The Fifth Circuit determined that promotions indisputably awarded to the bidder with greatest

departmental seniority must be included in a not-capable-of-separation-for-analysis disparate impact claim whenever the employer has discretion to award promotions based on other criteria even though it demonstrably did not. This decision has far-reaching consequences for collective bargaining. Many collective bargaining agreements that recognize and apply seniority routinely also condition eligibility for promotion on other criteria such as minimum qualifications, educational requirements, or ability determinations through testing or skill demonstrations, with such decisions often made at the discretion of the employer. National labor policy favors minimal intrusion into the negotiating process, allowing unions and employers flexibility in reaching agreement with respect to seniority. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the [National Labor Relations] Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) (explaining that the NLRA, while encouraging the making of voluntary agreements, does not compel agreement between unions and employers or regulate the substantive terms of any agreement reached). The Fifth Circuit's opinion, however, will undoubtedly intrude upon the bargaining process as employers and unions grapple with a holding that seniority-based promotions can now create disparate impact liability under § 2000e-2(k)(1)(B)(i).

This Court has previously acknowledged that seniority is universally recognized in collective bargaining agreements. *Trans World Airlines v. Hardison*, 432 U.S. at 79. In 1995, in 67% of collective bargaining agreements nationwide, seniority was given a role in determining promotions, but was the sole factor in promotions in only 5% of contracts. *Basic Patterns in Union Contracts*, Bureau of National Affairs, 46 (14th ed. 1995). In 49% of collective bargaining agreements, seniority was the determining factor assuming that a job applicant was qualified for the available job. *Id.* From this data, it is clear that the collective bargaining process throughout the nation and in most industries fashions agreements in which seniority is an important factor but not the exclusive basis on which competitive benefits such as promotional opportunities are awarded.

Under the Fifth Circuit's formulation, however, simply because a collective bargaining agreement permits the employer discretion in applying factors other than seniority in the decision-making process, the collective bargaining agreement's seniority-based benefits would no longer be protected from disparate impact analysis. Section 703(h), meticulously crafted by Congress, was intended to balance the occasional conflict between our national policy to eliminate discrimination in employment and our national policy favoring minimal supervision over the substantive terms of collective bargaining. *Am. Tobacco v. Patterson*, 456 U.S. at 76-77; *see Cal. Brewers v. Bryant*, 444 U.S. at 608 ("Congress passed the Civil Rights Act of 1964 against the backdrop of this nation's longstanding labor policy of leaving to the chosen representatives of employers and employees

the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products.") (citation omitted). It did so by declaring that in the absence of intent to discriminate Title VII would allow the existence of a disparate effect arising from the allocation of competitive benefits by seniority. *See Am. Tobacco v. Patterson*, 456 U.S. at 75-77; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 352 ("[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.").

By allowing plaintiffs to prove disparate impact using "numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate," Pet. App. at 19a, the Fifth Circuit permits conduct made lawful by § 703(h) to contribute to, and perhaps produce, a disparate impact sufficient to establish unlawful conduct.[1] Using the not-capable-of-separation-for-analysis model added to Title VII in the Civil Rights Act of 1991, the Fifth Circuit adopts a methodology that allows seniority systems to be attacked solely on disparate impact grounds without

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[1] In its recital of the evidence, the Court of Appeals further noted that "Plaintiffs presented additional evidence that approximately half of all promotions were not awarded to the most senior bidder." *Id.* at 14a. Of course, the logical inference from such a finding is that the other half of the promotions were awarded to the most senior bidder and that plaintiffs could determine when this occurred.

any showing of discriminatory intent. As a result, back pay compensation is due for promotions undisputedly awarded to the most senior bidder. Confronted with such back pay liability, and the spectre of a prohibitory injunction for such conduct, Lufkin, as would any other employer, will certainly change its position on seniority in collective bargaining either to avoid additional back pay from a continuing disparate effect or to comply with the ordered injunctive relief. *See Am. Tobacco v. Patterson*, 456 U.S. at 70 ("An adequate remedy for adopting a discriminatory seniority system would very likely include an injunction against the future application of the system and back pay awards for those harmed by its application.").

The impact of the decision, however, is more pernicious. The Fifth Circuit's decision, or new litigation prompted by the opportunity to create disparate impact from seniority-based decisions, will compel employers to re-evaluate their use of seniority systems to award benefits and thereby impinges on the freedom to bargain § 703(h) was meant to protect. *Cf. Id.* at 71 (rejecting EEOC theory that would discourage unions and employers from modifying pre-Act seniority systems as infringing on contractual freedom). The harm is significant. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Trans World Airlines v. Hardison*, 432 U.S. at 79. Seniority provisions are of overriding importance in collective bargaining. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964). Because seniority issues are both

commonplace and critical to collective bargaining, the Fifth Circuit decision threatens to alter on a broad scale the balance so carefully crafted by Congress to alleviate the tension between the two most important statutory schemes regulating the nation's workplaces – the National Labor Relations Act and Title VII of the Civil Rights Act. *See Am. Tobacco v. Patterson*, 456 U.S. at 77 ("Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.").

B. In Favoring the Application of the Not-Capable-of-Separation-For-Analysis Method of Proof Over Seniority Systems, the Fifth Circuit Seriously Misapprehends the Breadth of § 703(h).

The Fifth Circuit erred in two fundamental ways. First, it did not address § 703(h)'s plain command that it shall not be an unlawful employment practice for an employer to apply different terms or conditions of employment pursuant to a bona fide seniority system. Section 703(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result

> of an intention to discriminate because of race, color, religion, sex, or national origin, ...

42 U.S.C. § 2000e-2(h).

Section 703(h) delineates which employment practices are illegal and thereby prohibited and which are not. *Franks v. Bowman Transp.*, 424 U.S. at 758. A disparate effect among black and white employees that results from a seniority system is not an unlawful employment practice unless it is the product of an intent to discriminate. *Pullman-Standard v. Swint*, 456 U.S. at 289; *see also Lorance v. AT&T Techs.*, 490 U.S. at 908 (proof of discriminatory intent is a necessary element of Title VII actions challenging seniority systems); *Am. Tobacco v. Patterson,* 456 U.S. at 65 ("Under 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved."). Simply put, it was the intent of Congress that promotion by seniority is lawful, notwithstanding any disparate effect. In counting the discriminatory effect arising from seniority-based promotions to establish statistically significant disparate impact, the Fifth Circuit improperly used the effects of conduct that Congress specifically and carefully pronounced to be lawful to establish unlawful discriminatory impact. In so doing, it rendered lawful conduct unlawful and punished Lufkin for decisions expressly declared lawful by § 703(h). *See Trans World Airlines v. Hardison*, 432 U.S. at 82.

The damage thus done is most easily illustrated in the Fifth Circuit's remand on class-wide back pay. On remand, the Fifth Circuit directed, "the district court

will be dealing solely with damages attributable to approximately 127 lost promotions in hourly pay grades," and shall "compute the total additional wages attributable each year to each promotion and divide the value among the class members." Pet. App. at 26a. Notwithstanding that the Fifth Circuit found that a certain number of those 127 lost promotions were indisputably awarded to the senior bidder, it has directed that Lufkin pay back pay attributable to such promotions. The imposition of a back pay award to promotions made by seniority is contrary to § 703(h). *See Trans World Airlines v. Hardison*, 432 U.S. at 82 ("The Court of Appeals' conclusion that TWA was not limited by the terms of its seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory purpose had been shown. That ruling is plainly inconsistent with the dictates of § 703(h), both on its face and as interpreted in the recent decisions of this Court."). Moreover, although the Fifth Circuit recognized that it will be "especially difficult to craft an adequate remedial order that will eliminate discrimination without hobbling Lufkin's legitimate promotion policies," Pet. App. at 31a, presumably the district court will be required to enter injunctive relief to cure the disparate impact found including that arising from those promotions that were awarded based on seniority. *See Am. Tobacco v. Patterson*, 456 U.S. at 70.

The Fifth Circuit's error was to combine promotion decisions in which Lufkin did not exercise its subjective judgment or discretion (with promotion proceeding strictly by seniority) with decisions in

which Lufkin exercised subjective judgment and discretion and promoted individuals notwithstanding their seniority. Permitting plaintiffs to challenge the subjective and discretionary application of the seniority provisions by statistically analyzing all promotions, including those based on seniority, does by indirection what § 703(h) forbids. Under the vast majority of collective-bargaining agreements, to deprive seniority-based promotions of § 703(h) protection because the employer may have relied – but did not – on subjective and discretionary criteria treats the employer as if § 703(h) were not in the statute.

The Court of Appeals' ruling thus eviscerates the protection Congress afforded seniority systems. By counting the shortfall in expected black promotions where the actual basis for decision was departmental seniority, the Fifth Circuit permits a finding of unlawful disparate impact to flow directly from, and be significantly produced by, the lawful disparate effect of seniority. To justify this result by stating that the employer *could have* exercised its discretion to select based on some other subjective criteria cannot overcome the special treatment afforded seniority systems by Title VII.

Second, the Fifth Circuit's decision does not recognize the primacy of § 703(h) over the more recently enacted § 2000e-2(k)(1)(B)(i). Section 703(h) begins, "Notwithstanding any other provision of this subchapter," an admonition that requires the subordination of the not-capable-of-separation-for-analysis method of disparate impact proof to the application of seniority systems. The Fifth Circuit's decision which mandates the inclusion of seniority-

based promotions in establishing disparate impact under the not-capable-of-separation-for-analysis methodology effectively makes the subordination clause meaningless. Because Lufkin did, in fact, *apply* its seniority system in making certain promotions, the subordination clause precludes using those seniority-based promotions to create unlawful conduct.

The Fifth Circuit's failure to respect the subordination clause in its application of the not-capable-of-separation-for-analysis provision is particularly troubling in light of its recognition that evidence indisputably established that numerous promotions were based on seniority. Under the guise of the district court's determination that Lufkin could exercise subjectivity and discretion in promotions, although it did not in fact do so in approximately 50% of the promotions, the Court of Appeals has transformed § 2000e-2(k)(1)(B)(i) into an examination of the cumulative effect of Lufkin's application of various criteria in the promotion process, rather than limiting its application to functionally-integrated practices that cannot, as an evidentiary matter, be separated so as to permit independent analysis of each factor. This was not what Congress intended in enacting Section 105(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).

Supreme Court precedent pre-dating the 1991 Amendments requires that plaintiffs identify the specific employment practice that they challenge and establish that practice as responsible for statistical disparities. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J. plurality opinion) ("[E]specially in cases where an employer combines

subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (precluding disparate impact liability based on showing of racial imbalance "at the bottom line" and requiring plaintiff to demonstrate that the application of a specific employment practice has created the disparate impact under attack). An earlier version of the 1991 amendment, H.R. 1, provided for disparate impact resulting from the cumulative effect of a group of employment practices, departing from the requirement of identifying and isolating the particular responsible practice. H.R. 1, 102d Cong. § 4 (1991) (providing an unlawful employment practice is established where a complaining party demonstrates that a "group of employment practices" results in a disparate impact); *see also* H.R. REP. NO. 102-40(I) at 30-31, 41-42 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 568-69, 579-80. This bill was not enacted and the particular provision for a cumulative effect disparate impact was not passed. Rather, § 2000e-2(k)(1)(B)(i) permits a much narrower departure from the requirement for isolating the responsible practice, where "the elements of a respondent's decisionmaking process are not capable of separation for analysis." The official legislative history makes clear that this analysis was intended to apply to "particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as [] height and weight requirements . . . ." Interpretive Memorandum, 137 CONG. REC. S. 15276 (daily ed. Oct. 25, 1991),

reprinted in 1991 U.S.C.C.A.N. 767; *see* Civil Rights Act of 1991, Pub. L. 102-166, § 105(b) (1991). This Court's standard, then, survived in large part the enactment of § 2000e-2(k)(1)(B)(i). *See Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (relying on *Wards Cove* to fault petitioners for failure to identify the specific practice being challenged as responsible for a disparate impact under the Age Discrimination in Employment Act). Thus, the Fifth Circuit's decision allowing plaintiffs to test the cumulative effect of a group of practices (including a seniority system), separable through evidence, on the basis that the employer has discretion to select which practice it will use in any particular decision making is not a proper application of the not-capable-of-separation-for-analysis review.

C. The Fifth Circuit's Decision Stands in Direct Conflict With *California Brewers*, Which Protects Seniority Systems Even When They Are Combined With Non-Seniority Criteria in Collective Bargaining Agreements.

These errors are not avoided by the fact that Lufkin's promotion process includes other criteria which Lufkin can use to make promotion decisions. A seniority system does not lose its status as such simply because an employer or, more specifically, the collective bargaining agreement, permits decision making based on seniority and non-seniority criteria. In *California Brewers Ass'n v. Bryant, supra*, this Court discussed the meaning of a "seniority system" under § 703(h). A "seniority system," the Court defined, is "a scheme that, alone or in tandem with

non-seniority criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. at 605-06; *see also Lorance v. AT&T Techs.*, 490 U.S. at 905 ("Seniority is a contractual right . . . and a competitive seniority *system* establishes a 'hierarchy [of such rights] . . . according to which . . . various employment benefits are distributed'") (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976)).

The Court made clear that the combination of seniority with non-seniority criteria does not deprive seniority-based promotions of § 703(h) protection, though the non-seniority criteria would not necessarily share such protection:

> A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703(h) does not mean that the aptitude tests or the height requirements would also be covered.

Cal. Brewers Ass'n v. Bryant, 444 U.S. at 606 n.13. This Court also recognized that criteria having no relationship to seniority are not extended the protections of § 703(h) simply because of their "nexus" to seniority provisions:

> Significant freedom must be afforded employers and unions to create differing seniority systems.

> But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.

Id. at 608.

The reverse must be equally true – that seniority provisions do not lose their protection because of their use in combination with other factors. Thus, Lufkin's practice of promoting to some positions based on seniority pursuant to the collective bargaining agreement is a seniority system warranting protection under § 703(h). It does not lose its character as such simply because the company was authorized to use either seniority or some other non-seniority factors to make promotion decisions. Likewise, the seniority system did not lose its protection because, at the threshold, the company faced a subjective choice as to whether to rely on seniority or some other factor – the alleged practice challenged here. *California Brewers* does not permit such a result.

II. THE FIFTH CIRCUIT'S DECISION IMPOSING A LIABILITY PERIOD FOR A TITLE VII CLASS CLAIM BEGINNING ALMOST THREE YEARS BEFORE THE CHARGE THAT THE COURT OF APPEALS FOUND EXHAUSTED THE ADMINISTRATIVE REMEDIES FOR THE CLASS WAS FILED CONFLICTS WITH THIS COURT'S DECISIONS NEGATING LIABILITY FOR ACTS OUTSIDE THE TITLE VII LIMITATIONS PERIOD.

The Court should also review the Fifth Circuit's clear misapplication of Title VII and established Supreme Court precedent in allowing liability to be determined and back pay awarded on promotion decisions not challenged in a timely charge. The liability period, according to the district court, was governed by Plaintiff McClain's January 29, 1995 letter (which the district court accepted as a charge), as opposed to Buford Thomas's February 24, 1997 charge. The Fifth Circuit, however, determined that McClain's letter failed to exhaust the class's administrative remedies. The Fifth Circuit held that only Thomas's later-filed charge could support the class promotion claims. Nevertheless, the Court of Appeals used the time-barred promotions (occurring more than 300 days before Thomas's charge) to support the liability finding and directed the district court on remand to include in the back pay calculation promotions that were not subject to a timely charge. The Fifth Circuit summarily rejected Lufkin's request on rehearing to clarify that Thomas's charge establishes the liability period for promotion which begins on April 2, 1997, 300 days prior to the filing of Thomas's charge, and not on March 6, 1994, 300 days prior to McClain's letter. 42 U.S.C. § 2000e-5(e)(1).

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007). Failure to promote is a discrete discriminatory act not actionable if time barred, even if related to acts in timely filed charges. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002). In not applying the well-established precedent of the Court as to acts not made the basis for a timely charge, the Fifth Circuit places itself in direct conflict with this Court.

CONCLUSION

Congress has determined that promotion by seniority is not unlawful unless there is intent to discriminate. To permit seniority-based promotions to establish unlawful conduct by disparate impact, or contribute to it, violates § 703(h)'s plain language and its primacy over the not-capable-of-separation-for-analysis method of disparate impact proof articulated in § 2000e-2(k)(1)(B)(i), and is contrary to numerous decisions of this Court. The petition should be granted to consider the first question presented to avoid compromising the process of collective bargaining as the nation's unions and employers grapple with the far-reaching consequences of no longer being protected from a finding of unlawful conduct emanating from the possible disparate effect of seniority systems.

The petition should be granted to consider the second question to correct the Fifth Circuit's plain error in not recognizing and applying well-established

precedent of this Court establishing that a discriminatory act which is not made the basis of a timely charge is an unfortunate event in history which has no present legal consequences. *See United Air Lines v. Evans*, 431 U.S. at 558.

Respectfully submitted,

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